APPENDIX A

Assistant Attorney General
Legislative Affairs

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

June 14, 1977
July 17, 1977

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand that your Committee will soon begin marking up H.R. 7330, a bill "To establish a uniform Law on the subject of Bankruptcies." Set forth below are a number of problems which this Department has with this most important piece of legislation.

1. *Article III Status of Bankruptcy Courts*

Although the Department continues to be opposed to the creation of Article III status for bankruptcy courts, we no longer support suggestions that bankruptcy courts be established as independent courts under Article I of the Constitution. In a March 16th letter to Subcommittee Chairman Don Edwards on H.R. 6, this Department stated that it preferred that independent bankruptcy courts be established under Article I rather than Article III. However, a subsequent study of the question of the constitutionality of an Article I bankruptcy court has indicated that the Department cannot, in the context of the present legislative record, support the constitutionality of such a court. This study, prepared by the Department's Office of Legal Counsel, is attached as an appendix to this letter.

It would, however, be unwise, and unnecessary in the Department's opinion, to erect a parallel to the existing

district court structure in the form of Article III bankruptcy courts which would have broader jurisdiction than the district courts. The judicial power of the United States, conferred by Article III of the Constitution, is a formidable power which must be conserved and to the maximum extent possible reposed in a single set of traditional and generalized district courts. To delegate or expend this power unnecessarily will be inevitably to dilute its prestige and influence. The number of district and circuit courts is presently expanding under the pressures of increased workload. To the extent however that complex and specialized functions such as bankruptcy, can be handled within the historical generalized jurisdiction of the district courts, the Department believes this should be accomplished. District courts must of course be increasingly aided in utilizing adjunct masters, referees, magistrates to help them perform their duties. We therefore believe that bankruptcy jurisdiction, acknowledging its specialized nature, should continue to be performed by district judges with the aid of competent bankruptcy referees.

[sections on United States Trustees, government claims, tax provisions and exempt property deleted]

Sincerely,

Patricia M. Wald
Assistant Attorney General

APPENDIX

You have requested our views on three Constitutional questions raised by H.R. 7330. These questions are: (1) may the powers which the bill vests in the judges of the newly created bankruptcy courts be vested in an Art. I ("legislative") court or must they be vested in an Art. III court; (2) may these powers be vested in existing

bankruptcy judges who do not have life tenure but who operate as adjuncts of the district courts under the existing judicial machinery for the adjudication of bankruptcy cases; and (3) may the proposed United States Trustees established by the bill be appointed and supervised by the judiciary, through the Administrative Office of the United States Courts, or does the Constitution require that they be appointed and supervised by the executive branch.

The bankruptcy courts proposed to be established by H.R. 7330 have certain enumerated powers, including exclusive plenary jurisdiction over bankruptcy cases, nationwide process, and the power to enjoin state court proceedings concerning the bankrupt. While H.R. 7330 proposes to establish these courts as Art. III courts, whose judges enjoy, under the Constitution, life tenure and protection against diminution in salary, we have been asked for our views as to whether the proposed courts, or similar courts, could be established under Art. I of the Constitution. Although the matter is not entirely free from doubt, it is our opinion that, based on the facts and circumstances disclosed in the various extensive studies of the bankruptcy laws and their administration, the proposed bankruptcy courts cannot be created as Art. I courts.

Art. III, sec. 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Nevertheless, despite the apparent exclusivity of the grant of the Federal "judicial power" in Art. III, the

Supreme Court has, in certain circumstances, upheld the authority of Congress to create "legislative courts" whose judges do not enjoy the protections provided by Art. III.

These cases fit into a number of fairly definable categories. The first broad category encompasses special geographic areas over which Congress exercises plenary power. Thus, with respect to the territories, over which Congress exercises plenary authority equivalent to the power of a state legislature, the creation of legislative courts has been upheld, *American Insurance Co. v. Cantor*, 1 Pet. 511 (1828), and this result extends to other areas over which Congress had total sovereignty: unincorporated areas outside the continental United States, *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); and the District of Columbia, *Palmore v. United States*, 411 U.S. 389 (1973). Based upon similar reasoning, the Supreme Court has upheld the creation of a legislative court to determine private land claims in one of the territories, *United States v. Coe*, 155 U.S. 76 (1894) and to determine questions of tribal membership relevant to claims within Indian territory, *Stevens v. Cherokee Nations*, 174 U.S. 445 (1899); *Ex parte Joins*, 191 U.S. 93 (1903).

The second category is with respect to the military where the Supreme Court, relying on Congress' Constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, sec. 8, cl. 14, has upheld the authority of non-Art. III military courts to try members of the armed services accused of "service connected" crimes. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969).

The third category consists of courts established to adjudicate disputes between citizens and the Government which "from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 91929). Because these

claims could be reserved to Congress itself or committed exclusively to the executive branch for resolution, Congress was also held to have the power to submit the matter to a legislative court.

The final relevant precedent is *Crowell v. Benson*, 285 U.S. 22 (1932), in which the Court sustained the authority of an administrative agency to adjudicate workmen's compensation claims, which were disputes between private parties, subject to judicial review. While *Crowell* might be considered authority for committing any case within the judicial power to an administrative agency so long as review of the legal issues is provided in an Art. III court, in *Atlas Roofing Co. v. Occupational Safety & Health Review Committee*, 45 U.S.L.W. 4312 (U.S. Mar. 23, 1977) the Supreme Court expressed a narrow view of *Crowell*, indicating that only some, largely undefined, adjudicatory functions can be performed by administrative agencies subject to judical review. *Id.* at 4314 n. 7.

Leaving the *Crowell* case aside, it is apparent that the proposed bankruptcy courts, whose jurisdiction involves primarily the litigation of claims of private right, do not fall within any of the previously defined situations in which the creation of a legislative court has been upheld. An analysis of the Supreme Court's most recent decision concerning the creation of legislative courts indicates that the proposed bankruptcy court cannot be created as an Art. I court. In *Palmore v. United States, supra*, Palmore was tried and convicted of a crime in the Superior Court of the District of Columbia, an Art. I court whose judges did not enjoy Art. III tenure protection. Palmore sought Supreme Court review on the ground that he was entitled to be tried before an Art. III judge. The Supreme Court rejected this contention:

> [T]he requirements of Art. III, which are applicable where laws of national applicability and affairs

> of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 407-408.

Applying this test, the Court concluded that the District of Columbia's particularized needs, which had been characterized as a judicial crisis, * coupled with Congress' plenary power over the District of Columbia, supported the creation of a non-Art. III court to perform functions essentially similar to those of state courts, *i.e.*, the trial of cases arising under local law, thereby freeing the District's Art. III courts to "try cases arising under the Constitution and the nationally applicable laws of Congress." 411 U.S. at 409.

The language quoted above, approving the creation of Art. I courts "with respect to specialized areas having particularized needs . . .," is ambiguous in that it could be read as referring to either specialized areas of substantive law (in *Palmore* "local law;" here, "bankruptcy law") or to special geographical areas, *i.e.*, the District of Columbia. The context in which this phrase appears in *Palmore* — following an extended discussion of the nature of Congress' power over the District of Columbia (*id.* at 397-400), the role of territorial courts (*id.* at 402-04), and the fact that the matters heard in Superior Court were strictly of "local concern" (*id.* at 407) — suggests strongly that what the Court intended by the use of "specialized areas" was specialized geographical areas. While it may well be that *Palmore*, however read, does not close the door to the creation of Art. I courts of

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* Unhappily, the Court's analysis fails to come to grips with the nature of the "particularized need" in *Palmore* which justified the use of an Art. I rather than an Art. III court. Court congestion is as susceptible to amelioration by the appointment of Art. III judges as by creation of a new Art. I court.

a type not heretofore considered, it is clear that in such a case a peculiar and compelling need to avoid the tenure provisions of Art. III must be found by Congress, a need which, based upon the existing extensive studies of bankruptcy administration, appears to be lacking here. Thus, upon the present state of the record, regardless of how *Palmore* is read, the Constitution requires that the bankruptcy court contemplated by H.R. 7330 be an Art. III court.

The second question is whether the powers which H.R. 7330 proposes to grant to the judges of the proposed bankruptcy court may be exercised by the existing bankruptcy judges, who do not enjoy life tenure, under the general supervision of District Court judges. It appears to us that these powers can be exercised by the existing bankruptcy judges who are adjuncts of the district courts. *Cf. Atlas Roofing Co. v. Occupational Safety & Health Review Committee*, 45 U.S.L.W. 4312, 4314 n. 7, (U.S. Mar. 23, 1977). This conclusion is supported by a number of arguments: first, in the seventy-nine years of practice under the existing Bankruptcy Act, no serious judicial challenge to the Constitutionality of the present system has been made and the historical use of referees (then called commissioners) in bankruptcy extends back to the Bankruptcy Act of 1800, Act of April 4, 1800, 2 Stat. 19, repealed by the Act of Dec. 12, 1803, 2 Stat. 248. Second, under the 1973 Bankruptcy Rules, promulgated by the Supreme Court, 415 U.S. 1003 (1973), the then existing role of the bankruptcy judge as a de facto trial judge was recognized, *e.g.*, Rule 901(7) (title changed from referee to bankrupt judge), Rules 801-05 (providing appeal to District Court rather than review) Rule 810 (establishing "clearly erroneous" standard for reversal of bankruptcy judge's factual determinations). Because these Rules were promulgated by the Supreme Court, the final arbiter of the meaning of the Constitution, it seems fairly clear that the existing rules and the

existing powers granted to bankruptcy judges must be Constitutional. See *Hanna v. Plummer*, 380 U.S. 460 (1965). Expansion of the powers of the existing bankruptcy judges in the manner contemplated by H.R. 7330 does not appear to be a sufficiently radical change as to render the continuation of the existing system of bankruptcy judges unconstitutional. The transition provisions in title IV of H.R. 7330, which provide that the existing bankruptcy judges shall exercise until 1983 the powers and jurisdiction of the proposed bankruptcy courts which will come into being at that time, except for a limitation on the power to enjoin state court proceedings and to punish certain contempts, appears to be in accord with this view.

[discussion of U. S. Trustees deleted]